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No. 770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOSEPH W. MORRIS
GEORGE E. ERICKSON, JR.
P. O. Box 2040
Tulsa, Oklahoma
CECIL E. MUNN
1800 First National Building
Fort Worth, Texas
Counsel For Petitioner

October 26, 1967

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

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AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 31, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (R. 95-99) is unreported (App. B., *infra* pp. 16-20). The opinion of the Court of Appeals (R. 109-113) (App. A., *infra* pp. 11-14) is reported at 381 F.2d 661.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1967, (R. 109). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

When a United States District Court obtains jurisdiction, in an action under the Federal Declaratory Judgment Act, brought in the defendant's residence city, which is the plaintiff's only available forum, and the defendant brings a later action, which she had previously threatened to bring, in another United States District Court involving exactly the same parties and issues, may the first court refuse to hear the prior action where both actions are equally capable of deciding the controversy?

STATUTE AND RULE INVOLVED

The statute and rule involved are the Declaratory Judgment Act, 28 U.S.C. Sections.2201-2202, and Rule 57, Fed. R. Civ. P., which provide as follows:

> Declaratory Judgment Act, 28 U.S.C. §§2201-2202:
>
> §2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> §2202. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been

determined by such judgment.

Rule 57, Fed. R. Civ. P.
Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

STATEMENT

This is a diversity action for a declaratory judgment that defendant does not own an interest, which she has asserted, in Amerada's past, present, and future oil production in the Kingdom of Libya.

In 1948 Amerada and two other oil companies formed, as equal owners, a service corporation to investigate potential foreign petroleum sources (R. 6-19). Its first president received a substantial salary and the right to earn participating interests in production from certain concessions acquired by negotiations initiated during his presidency (R. 22-23). Company obligations with respect to his rights were separate, not joint (R. 25).

The president assigned part of his participation right to respondent (R. 29-35), Miss Bettye M. Bo-

hanon (now Mrs. J. Howard Marshall), and upon terminating his employment in 1954, he and the companies executed a written delineation of countries where his participating interests would mature if petroleum was produced (R. 78-79). Mrs. Marshall declined to sign.

Libya was excluded from the delineation instrument (R. 78-79), but the companies later acquired concessions in Libya, where great petroleum sources were eventually discovered. In 1963, through her Washington, D. C., attorney, Mrs. Marshall asserted an interest in Libyan production (R. 79, 88), and in 1964 threatened Amerada with legal action (R. 79, 91). Although all three companies could have been sued in her residence city of Houston, Texas, she brought suit against the other two in Washington, D. C., where Amerada could not be joined (R. 52-57). Having heard nothing since 1964, Amerada resolved early in 1966 to seek a declaratory judgment and retained counsel for the purpose (R. 80-81). While completing initial research and drafting of pleadings, Amerada received on March 8, 1966, a letter from Mrs. Marshall's New York attorneys again threatening suit and urging Amerada to waive lack of jurisdiction and voluntarily submit the controversy to the Washington, D. C. Court (R. 71-72). Later in March, being determined to avoid the delay of the Washington, D. C. proceedings, Amerada filed suit in the United States District Court in Houston, as planned (R. 3-5).

For the convenience of Mrs. Marshall's Houston attorneys, Amerada stipulated to extend the answer

date to May 9 (R. 36-37). On that date, she answered and moved to dismiss, transfer, or stay the declaratory action (R. 38-44). Her New York attorneys simultaneously filed an accounting action against Amerada in the United States District Court for the Southern District of New York, which Amerada moved the Houston court to enjoin (R. 74-75).

The Houston Court denied the motion to dismiss the declaratory action because it had been properly brought under the Federal Declaratory Judgment Act. It denied the motion to transfer because the "declaratory judgment action might not have been instituted either in the District of Columbia or in the Southern District of New York by Amerada against Mrs. Marshall, nor is the doctrine of forum non conveniens available, as there is no alternative forum wherein Amerada might have filed the suit." (R. 98). It did nonetheless stay the declaratory action until final adjudication of the later New York action, enjoined Amerada from proceeding in Houston, and denied Amerada's motion for an injunction against the later New York action. Regarding the question before it as essentially involving a choice of forums, although having recognized the precise equality of the parties and issues in both actions and the inapplicability of forum non conveniens, the Court held that the defendant "Mrs. Marshall is the *real plaintiff* and *her* choice of forums is not to be lightly set aside." (R. 99).[1]

The Court of Appeals below affirmed, holding that

[1]All italics in this Petition are ours.

the District Court, for the reasons given by it, had discretion to refuse to hear the petition for declaratory relief (R. 113).

REASONS WHY THE WRIT SHOULD ISSUE

1. By affirming the District Court's refusal to hear the prior declaratory action when the later action involved exactly the same parties and issues in another federal court and each action was equally capable of determining the controversy, the Fifth Circuit places itself directly in conflict with decisions of the Courts of Appeal for the Second, Third, Seventh, Eighth, Tenth, and District of Columbia Circuits. *Helene Curtis Industries v. Sales Affiliates*, 199 F.2d 732 (2nd Cir. 1952); *Cresta Blanca Wine Co., Inc. v. Eastern Wine Corporation*, 143 F.2d 1012 (2nd Cir. 1944); *Crosley Corporation v. Westinghouse Electric and Manufacturing Company*, 130 F.2d 474 (3rd Cir. 1942), cert. den. 317 U.S. 681; *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corporation*, 125 F.2d 1008 (3rd Cir. 1942), cert. den. 316 U.S. 676; *Crosley Corporation v. Hazeltine Corporation*, 122 F.2d 925 (3rd Cir. 1941), cert. den. 315 U.S. 813; *Martin v. Graybar Electric Company*, 266 F.2d 202 (7th Cir. 1959); *New York Life Ins. Co. v. Roe*, 102 F.2d 28 (8th Cir. 1939); *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653 (10th Cir. 1946); *Speed Products Co., Inc. v. Tinnerman Products, Inc.*, 171 F.2d 727 (D.C. Cir. 1948). See also the concurring view of the Sixth Circuit, where dismissal only was involved, in *Maryland Casualty Co. v. Faulkner*, 126 F.2d 175 (6th Cir. 1942) and *Employer's Liability*

Assur. Corporation v. Ryan, 109 F.2d 690 (6th Cir. 1940).

This ruling presents a question of substantial importance to the uniform application of the Federal Declaratory Judgment Act, and one on which the Circuits are now divided.

The conflict between the Circuits may be illustrated by comparing the ruling below with the holding of the Court of Appeals for the Third Circuit in *Crosley Corporation v. Westinghouse Electric and Manufacturing Co.*, 130 F.2d 474 (3rd Cir. 1942), cert. den. 317 U.S. 681. The trial court below has held, and been affirmed by the Fifth Circuit, that even though it took jurisdiction of the declaratory suit before the accounting action was filed in the Southern District of New York, it has no duty to proceed to adjudicate the issues between the parties or to enjoin them from proceeding further in the New York suit. In square conflict, the Third Circuit held in *Crosley:*

> "Since the court below took jurisdiction of the declaratory suit before the infringement suits were filed in the district court in Ohio, even though but one day intervened, *it became its duty to proceed to adjudicate the issues* between the parties and meanwhile to enjoin them from proceeding further in the Ohio suits." (130 F.2d at 475).

Further, the court below held that proof that the declaratory action defendant had previously *threatened* to sue the declaratory action plaintiff defeats entitlement to declaratory relief if, after the declara-

tory action is filed, the defendant therein does institute suit in a different federal forum. In conflict, the Court in *Crosley* effectively held that the proof of such *threatened* litigation itself justifies invoking declaratory relief. 17 Temple University Law Quarterly 95, 96, is a law review note on *Crosley* which it summarizes in this way:

> "Although mere apprehension of suit is insufficient, the *threat* of an infringement suit *is ground for seeking declaratory relief.*"

2. The interpretation of the Federal Declaratory Judgment Act by the Court below is in conflict with the applicable decisions of this Court. The ruling below treats the declaratory judgment as a second class citizen among the federal judicial remedies. Citing this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, [which did *not* involve a declaratory action at all], the Court below judicially transmuted the defendant into a plaintiff and as a result of that transmutation bestowed upon her a preferential entitlement to choose a different forum even after the declaratory action had been filed:

> "Mrs. Marshall is the *real plaintiff* and *her* choice of forums is not to be lightly set aside." (R. 99).

Therein lies the expressly stated basis of the ruling here challenged. Such a view is in square conflict with the lesson of this Court's opinion in one of the first writs of certiorari issued to a Court of Appeals which had misinterpreted the Federal Declaratory Judgment Act. In *Aetna Life Insurance Company v. Haworth*,

300 U.S. 227, 244 (1936), this Court wrote:

> "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

The importance of maintaining the viability of the Declaratory Judgment Act again warrants close examination by this Court of a lingering reluctance to apply it. Twenty-six years ago it was observed that . . . "Some District Courts seem to have found difficulty in freeing themselves from the strait-jacket of the 'adversary' conception. They exhibit a tendency toward a narrow and technical interpretation of an Act intended to be construed in accordance with its broad and wise purpose." *Treemond Co. v. Schering Corporation*, 122 F.2d 702, 703 (3rd Cir. 1941). Time has not dulled the applicability of that observation within the Fifth Circuit.

A leading authority on declaratory judgments explained the rules limiting discretion involved here. "[T]he court's discretion is *not* properly used when the declaratory action is dismissed because the defendant might sue . . . in some future action. * * * There is no 'discretion' to refuse to assume jurisdiction over a case which is properly before the court and which is entirely appropriate for declaratory adjudication." Borchard, "Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments," 26 Minn. Law Rev. 680, 684-685 (1942). "It is the adequacy or utility of the declaratory judgment, not of another remedy, which is determinative." Borchard, "Declaratory Judgment, 1939", 9 Brooklyn Law Rev. 1, 7

(1939). "Identity of issues and parties should foreclose the exercise of after-acquired federal jurisdiction." Borchard, Declaratory Judgments (2d ed. 1941) p. 659. Most courts accept Borchard's position. Action by this Court is required to achieve complete uniformity.

3. The lower court misapplied this Court's decisions.

The cases cited below to show declaratory suits are entertained with discretion (R. 112) (App. A., *infra* pp. 13-14) do not require the conflict among the Circuits created by the ruling below, nor do they justify that ruling. In *Kerotest Manufacturing Company v. C-O-Two Fire Equipment Company*, 342 U.S. 180, the declaratory action was filed *later* and did *not* involve *all* parties; in *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, there was only *one* action involved, which this Court said should not be heard because . . . "So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief."; and in *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491, the declaratory action was *subsequent*, not prior, to the other case, which was pending in a *state*, not a federal, court. These cases properly show circumstances warranting discretionary denial of declaratory relief. None of such circumstances is present in the case at bar.

Believing Amerada "anticipated" action by Mrs. Marshall, the Fifth Circuit noted one Court of Appeals decision to support its view that anticipation may be considered in denying relief (R. 113) (App, A., *infra* p. 14). Yet, that case, *Aetna Casualty and*

Surety Company v. Quarles, 92 F.2d 321 (4th Cir. 1937) involved two cases pending in the *same* court. The only court interpreting *Quarles* as the court below did was *reversed* for doing so in *New York Life Ins. Co. v. Roe*, 102 F.2d 28 (8th Cir. 1939). Moreover, the thought that by "anticipating" one forfeits declaratory relief is incomprehensible. Quite obviously, the precise purpose of the Declaratory Judgment Act is to permit a threatened party to submit the controversy for decision. Such submission necessarily "anticipates" a claim by the declaratory defendant. The Act serves no useful purpose if forum shopping declaratory defendants are allowed the control permitted in this action.

4. There is no equitable reason justifying federal refusal to hear the declaratory action. It was brought in good faith two years after unfulfilled threats. In the meantime, another action was deliberately brought excluding Amerada, although all three companies could have been joined in Mrs. Marshall's residence city. Amerada had but one forum available —Mrs. Marshall's own place of residence (28 U.S.C. §1391(a)). She has no business or family connections whatever with New York, but merely has the financial good fortune to be able to visit there at her pleasure. Records involved were moved from New York to Tulsa, Oklahoma, several years ago when Amerada fully absorbed the service corporation. There would seem to be but one reason to prefer New York—and the convenience of counsel for one party is not sufficient justification for defeating the purpose of the Declaratory Judgment Act.

CONCLUSION

In order to correct a serious conflict among Courts of Appeals, to remedy a departure from decisions of this Court, and to maintain the viability of the Declaratory Judgment Act and orderly administration of the federal judiciary, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph W. Morris
George E. Erickson, Jr.
Cecil E. Munn

Dated October 26, 1967

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24019

AMERADA PETROLEUM CORPORATION,
Appellant,

versus

BETTYE M. MARSHALL, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(July 31, 1967.)

Before HUTCHESON, GOLDBERG and DYER, Circuit Judges.

HUTCHESON, Circuit Judge: This appeal is from an order of the district court refusing to hear a petition for declaratory judgment. We affirm.

In 1948 appellant Amerada Petroleum Corporation, Continental Oil Company, and Marathon Oil Company agreed to organize jointly Coronada (sic) Petroleum Corporation whose purpose would be to acquire oil properties outside the United States. One Arthur A. Curtice was employed as the president of Coronada (sic) and he received as compensation a participating interest in properties acquired by Coronada (sic) dur-

ing his employment. Curtice assigned to appellee Bettye Marshall 10% of his participating interest as compensation for her job as his executive assistant. Coronada (sic) later acquired some oil properties in Libya. The instant case is part of the litigation which ensued when in September 1963 Mrs. Marshall informed Amerada, Continental, and Marathon of her intention to assert a claim to an interest in the Libyan production.

In 1964 Mrs. Marshall instituted suit in the United States District Court for the District of Columbia against Continental and Marathon, both doing business in that jurisdiction. Amerada, not amenable to service in the District of Columbia, could not be joined as party defendant in that action. Both Continental and Marathon moved to transfer the case to New York on the ground that it was a more convenient forum. The motion was denied.

Thereafter, on March 8, 1966, counsel for Mrs. Marshall wrote a letter to Amerada inviting it to appear voluntarily in the District of Columbia to the end that the litigation might be unified; Amerada was advised that if it chose not to appear, Mrs. Marshall would bring suit against it in a jurisdiction where it was subject to service. Approximately three weeks later Amerada filed the instant action for declaratory judgment in the Southern District of Texas. About 40 days later, Mrs. Marshall commenced suit against Amerada in the United States District Court for the Southern District of New York.

In response to the petition filed in the court below, Mrs. Marshall moved (a) to dismiss, (b) to transfer

to the District of Columbia or the Southern District of New York, or (c) to stay the declaratory judgment action pending the outcome of the suit she had filed in New York. The first two motions were denied, but the motion to stay was granted.

The district judge noted that the sole issue before him was whether he should hear the petition and declare the rights of the parties. The judge felt that the essential question that he was called upon to decide was whether the proper forum for the litigation between the parties was the Southern District of Texas or the Southern District of New York. In deciding that the latter is the proper forum, he emphasized his conclusion that the filing of the declaratory judgment action in the court below was triggered by the letter stating that Amerada would be sued by Mrs. Marshall if it did not appear in the District of Columbia as party defendant along with Continental and Marathon. Thus he did not regard as controlling the fact that the instant action was filed by Amerada shortly before Mrs. Marshall filed her suit in New York. See *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 692 (9th Cir. 1961). Furthermore, New York was considered the more convenient forum on the grounds that it was the site of the execution of the contract, the work performed under the contract, and Coronada's (sic) principal place of business. On the other hand, the judge was of the view that the Southern District of Texas has no connection with the controversy other than as the residence of Mrs. Marshall, who is willing to make herself available for deposition and discovery in New York.

This is the type of case of which the Supreme Court has said:

> "The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, *does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.* (emphasis added)." *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 183-4 (1951).

The district court clearly was vested with discretion in deciding whether to hear the declaratory judgment suit which involves the same parties and issues as Mrs. Marshall's action filed in a court of coordinate jurisdiction.[1] There is sufficient evidence to support the judge's finding that the instant action was filed by Amerada as the immediate result of the letter inviting it to appear in the District of Columbia. Amerada has been aware of Mrs. Marshall's claim since September 1963, yet it apparently did not feel compelled to seek a determination of its rights for over two years. That Amerada's petition for declaratory

[1] "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962). Accord Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942).

judgment apparently was in anticipation of the New York suit is an equitable consideration which the district court was entitled to take into account. *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937); *Seaboard Sur. Co. v. Texas City Ref., Inc.*, 109 F. Supp. 468 (D. Del. 1952). Compare *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F.2d 474 (3rd Cir.) cert. denied, 317 U.S. 681 (1942).

Moreover, Amerada is not in the position of one who cannot obtain an adjudication of its legal rights; the only question here is in which of two jurisdictions should the adjudication take place. We cannot say that the judge acted outside the limits of his discretion in considering the factors which favor New York as the proper forum.

For the reasons given by the district judge, we affirm.

In view of this disposition of the cause, Mrs. Marshall's motion to dismiss is denied.

AFFIRMED.

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 24019

D. C. Docket No. CA 66-H-140

AMERADA PETROLEUM CORPORATION,
Appellant,

versus

BETTYE M. MARSHALL, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

Before HUTCHESON, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Amerada Petroleum Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Aug. 24, 1967 July 31, 1967

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-140

AMERADA PETROLEUM CORPORATION,
Plaintiff,

v.

BETTYE M. MARSHALL, *Defendant.*

June 27, 1966

MEMORANDUM:

This is a declaratory judgment action. Presently for consideration is a motion by the defendant (a) to dismiss, (b) to transfer to the United States District Court for the District of Columbia or for the Southern District of New York, or (c) to stay the present proceeding. An understanding of the question requires the following brief summary of the background from which the litigation springs.

Mrs. Bettye M. Marshall, the defendant here, seeks to assert a cause of action against the Continental Oil Company, Marathon Oil Company and Amerada Petroleum Corporation. Mrs. Marshall is a resident and citizen of this District and Division. Continental is chartered in the State of Texas and has its principal place of business here. Marathon is chartered in the

State of Ohio and has its principal place of business there. The plaintiff Amerada is chartered in the State of Oklahoma and has a principal office there (alleged by Amerada to be its principal place of business), as well as a principal office in New York City (alleged by Mrs. Marshall to be its principal place of business). The cause of action which Mrs. Marshall seeks to assert, the merits of which are not of concern at this time, results from a partial assignment to her of certain contract rights accruing to one Arthur A. Curtice. Mr. Curtice, as president of Conorada Petroleum Corporation, which was owned in equal shares by Continental, Marathon and Amerada, was to receive an interest in oil produced from concessions in certain foreign countries. Substantial production was had in the Kingdom of Libya beginning in 1961-62. Mrs. Marshall contends that by reason of her assignment she is entitled to a portion of this Libyan production. The three oil companies deny this.

In June 1964 Mrs. Marshall instituted suit in the United States District Court for the District of Columbia against Continental and Marathon. Amerada was not joined as a party defendant because it was not amenable to service in that jurisdiction. From that date until the events noted hereafter there seems to have been a temporary truce between Mrs. Marshall and Amerada.

Continental and Marathon, in the District of Columbia action, disputed the venue in the District of Columbia by various motions, contending that the Southern District of New York was the proper forum.

After extended proceedings in the District Court, venue was sustained, and leave to appeal the interlocutory order denied by the Court of Appeals for the District of Columbia. See, *Bohanon v. Continental Oil Co.*, C.A. No. 1418-64 (D.D.C. 6/29/65).

On March 8, 1966, counsel for Mrs. Marshall wrote the president of Amerada advising him of the developments in the District of Columbia action and inviting Amerada to appear voluntarily there, to the end that the litigation might be disposed of in a single suit; and advising "If you do not so consent, we would then perforce institute suit against your company upon these claims in an appropriate jurisdiction where you are clearly subject to service and to the jurisdiction of the court." Amerada made reply to this communication by filing the present declaratory judgment action in this Court. A few days thereafter, Mrs. Marshall filed a direct action against Amerada in the Southern District of New York.

In her present motions, Mrs. Marshall argues that the declaratory judgment action is in the nature of a request for equitable relief; that it should be entertained only when the plaintiff has no other remedy for an adjudication of its rights. It is argued further that the entertainment of such action is discretionary and that under the circumstances noted above the action should be dismissed. Alternatively, the Court is asked to transfer the action for consolidation with the District of Columbia suit or with the New York suit. As a further alternative, the defendant asks that the instant case be abated pending outcome of the New

York action. Defendant relies principally on *Aetna Casualty and Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937); *Seaboard Surety Co. v. Texas City Rfg., Inc.*, 109 F. Supp. 468 (D. Del. 1952); *American Tel. and Tel. v. Henderson*, 63 F. Supp. 347 (N.D.Ga. 1945).

Plaintiff Amerada argues that the declaratory judgment action is of equal dignity with the direct action involving the same cause of action, and that the authorities holding to the contrary are out of date; that Amerada has been subjected to this potential liability for an extended period and is entitled to an adjudication of its non-liability, and that being first in time compared to the New York suit, it is that action which should be abated. Amerada asks for an injunction to restrain Mrs. Marshall from proceeding with the New York case. Plaintiff further urges that the docket here is less crowded than in the Southern District of New York. Plaintiff cites *Maryland Casualty Co. v. Faulkner*, 126 F.2d 175 (6th Cir. 1942); *Samuel Goldwyn, Inc. v. United Artist Corp.*, 113 F.2d 703 (3rd Cir. 1940); *Carpenter v. Edmondson*, 92 F.2d 895 (5th Cir. 1937).

I am of the view that this Court is vested with a judicial discretion in entertaining a petition for declaratory relief, but that such relief should not be denied unless there be compelling reasons therefor. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962); *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Eccles v. People's Bank*, 333 U.S. 426 (1948). I am further of the view that the

motion to transfer is not well taken. The declaratory judgment action might not have been instituted either in the District of Columbia or in the Southern District of New York by Amerada against Mrs. Marshall [*Hoffman v. Blaski*, 363 U.S. 335 (1960)], nor is the doctrine of forum non conveniens available, as there is no alternative forum wherein Amerada might have filed the suit. *Rodriguez v. Pan American Life Insurance Company*, 311 F.2d 429 (5th Cir. 1962).

However, reduced to its essentials, the question is one of venue, calling for a choice between the Southern District of New York and this District as the proper forum. When Mrs. Marshall files a cross-action here, as she of necessity must do, the parties and issues will be precisely the same. Each side argues that the forum that it advocates should be more convenient for the adversary. Amerada points out that Mrs. Marshall resides here. She urges that Amerada's principal place of business (or at least one of its principal places of business) is in New York City.

It appears that the Conorada-Curtice contract was executed in New York; that the work performed thereunder was done in New York; that Coronada had its principal place of business in New York and that much of the record evidence is located there. The Southern District of Texas has no connection whatever with the controversy other than the fact that it is the residence of the defendant, who is willing to make herself available for deposition and discovery in New York.

I am not impressed by the fact that the present case was filed a few days prior to the New York action.

Kerotest Mfg. Co. v. C-O Two Fire Equip. Co., 189 F.2d 31 (3rd Cir. 1951) aff'd. 342 U.S. 180 (1952); *Seaboard Surety Co. v. Texas City Rfg. Inc.*, supra. While I accept the statement of plaintiff's counsel that Amerada had considered and proposed for sometime to institute a suit for declaratory relief, and had employed counsel for that purpose, I cannot escape the conclusion that the action was triggered by the letter of March 8, 1966. Under these circumstances, I am of the view that the clear preponderance is in favor of New York as the site of trial. Mrs. Marshall is the real plaintiff and her choice of forums is not to be lightly set aside. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946). This result should not be accomplished simply because Amerada is willing to assume the laboring oar as plaintiff, and because it beats its adversary to the punch by a few days, after a two year delay.

The motion to dismiss, and to transfer, is denied. However, this case will be abated and placed on the inactive calendar pending outcome of the proceedings in New York. In the event Mrs. Marshall does not pursue her remedy there with such diligence and dispatch as circumstances may permit, then the Court will entertain a motion to reinstate the present action on the trial calendar.

Done at Houston, Texas this 27th day of June, 1966.

/s/ Ben C. Connally
United States District Judge

(ORDER)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-140

AMERADA PETROLEUM CORPORATION,
Plaintiff,

v.

BETTYE M. MARSHALL, *Defendant.*

ORDER

This action came on for hearing before the Court upon the Defendant's Motion to Dismiss or to Transfer or Stay and upon the Plaintiff's Motion for Injunctive Relief. The Court duly considered the affidavits of Albert I. Edelman and of Elmer E. Batzell filed herein in support of defendant's motion and in opposition to plaintiff's motion, and the affidavits of Edwin S. Nail, Robert J. Stanton, and David N. Webster filed herein in support of plaintiff's motion and in opposition to defendant's motion.

The Court being fully advised in the premises, by briefs and oral argument of counsel for both parties, finds that, for the reasons set out in the Memorandum Opinion filed herein on the 27th day of June, 1966, defendant's said motion should be denied in part and granted in part and plaintiff's said motion should be and the same is hereby denied in its entirety.

It is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Defendant's motion to dismiss this action or to transfer the same to the United States District Court for the District of Columbia or for the Southern District of New York be and the same hereby is denied to which action the exception of the defendant is noted.

2. Defendant's motion to stay further proceedings herein until the final adjudication of Civil Action File No. 1418-64 styled Bettye M. Bohanon v. Continental Oil Company and Marathon Oil Company pending in the United States District Court for the District of Columbia, be and the same hereby is denied to which action the exception of the defendant is noted.

3. Defendant's motion to stay further proceedings herein until the final adjudication of Civil Action No. 66-1342 styled Bettye M. Marshall, also known as Bettye M. Bohanon v. Amerada Petroleum Corporation, pending in the United States District Court for the Southern District of New York, be and the same is hereby granted, and the plaintiff herein be and it hereby is enjoined from proceeding further herein by way of discovery or request for trial setting; provided that, in the event the defendant herein shall not pursue her remedy in said pending New York litigation with such diligence and dispatch as circumstances may permit, then the Court will entertain a motion to reinstate the present action on the trial calendar, to which action the exception of the plaintiff is noted.

4. Plaintiff's motion to enjoin the defendant from further prosecuting her complaint in said Civil Action

in the United States District Court for the Southern District of New York and from taking any further action therein until final disposition of this action be and the same hereby is denied to which action the exception of the plaintiff is noted.

DATED AND ENTERED at Houston, Texas, this 28th day of July, 1966.

Ben C. Connally
United States District Judge

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No. 770

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION,

Petitioner,

—v.—

BETTYE M. MARSHALL,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT I. EDELMAN
JAVITS TRUBIN SILLCOCKS
EDELMAN & PURCELL
375 Park Avenue
New York, New York 10022

REYNOLDS, WHITE, ALLEN & COOK
1340 Tennessee Building
Houston, Texas

Attorneys for Respondent

November 30, 1967

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—v.—

BETTYE M. MARSHALL,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

For more than three years (from July 30, 1964 to date) this respondent has been compelled to resist the forum maneuvers of the petitioner and its co-venturers and joint obligors, all parties to the single contract under which her claim herein is asserted (R. 46-52). This is the sixth Federal court to be occupied with these attempts.*

*1. U. S. District Court for the District of Columbia, 1964-5 (R. 91).
2. U. S. Court of Appeals for the District of Columbia, 1965 (R. 92).
3. U. S. District Court for the Southern District of Texas, 1966 (R. 3).
4. U. S. District Court for the Southern District of New York, 1966 (R. 74).
5. U. S. Court of Appeals for the Fifth Circuit (R. 102).
6. United States Supreme Court.

The Real Question Presented

The "question presented", as delineated in petitioner's brief at page 2, has little resemblance to the facts or circumstances in this case or the substantial grounds upon which the District Court stayed petitioner's action for a Declaratory Judgment in order to permit the direct suit instituted by the "real plaintiff" Bettye Bohanon Marshall to continue in the United States District Court, Southern District of New York. Such exercise of discretion by the District Court was affirmed by the Court of Appeals. The real question presented is whether the District Court before which a Declaratory Judgment suit is instituted by a "defendant" about to be sued elsewhere, has discretion to stay the action before it in favor of the direct suit brought in another Federal District Court by the real plaintiff, where the direct action was imminent and had been previously announced to the declaratory plaintiff, and where the Court finds under all of the circumstances, that the direct action is the more appropriate action and is brought in a more proper forum.

That this was an appropriate exercise of discretion may be gathered from the ensuing summary of facts and circumstances of the prior proceedings herein.

The Contract, the Parties, and the Claim

Continental Oil Company, Marathon Oil Company (then known as Ohio) and Amerada were joint contracting parties (R. 6) with Mrs. Marshall (by her maiden name Bettye M. Bohanon (R. 46)) when she became one of the three key executive employees, with her assignor Arthur A. Cur-

tice and Christian F. Dohm, in the joint and common enterprise created and equally owned by the three oil companies, namely Conorada Petroleum Corporation (R. 29, 55, 56). Conorada was formed for the purpose of seeking, exploring and developing petroleum opportunities and sources outside the United States (R. 53, 54).

As an inducement to attract Curtice and his management team, the employment contracts provided for certain participating interests in eventual oil production recovery in areas where negotiations were initiated by the Curtice management (R. 55).

The underlying contract upon which Mrs. Marshall's identical claim against all three oil companies rests, was executed on January 1, 1949 (R. 45). It is all one contract, one claim and one cause of action, identical as against the three oil companies, relating to their joint venture, joint undertaking and joint contract (R. 53).

It was only when the Libyan oil strikes occurred, and oil production began to flow in the Libyan fields, that Mrs. Marshall's contract claim ripened. That occurred in 1961 or 1962. (In the District of Columbia proceedings, Continental's affiant Thanhouser asserted that marketing of Libyan crude oil first began on June 1, 1962) (R. 87).

Following these events in Libya, attorneys on behalf of Mrs. Marshall investigated the facts and the law and advised her that she had a sound cause of action (R. 87).

In September 1963 Mrs. Marshall made formal and identical demand upon the three oil companies for an accounting under the contract and payment of her claim (R. 88). From that time forward all discussions, meetings and negotiations concerning the identical claim against the

three joint venturers were had with notice to and participation of all three oil companies (R. 89).

Prior History of Forum Proceedings

After breakdown of negotiations with the three oil companies in June 1964, Mrs. Marshall initially brought suit against Continental and Marathon in the United States District Court for the District of Columbia (R. 52), since those two out of the three contracting oil companies were doing business there (R. 47). It was believed that Amerada, petitioner herein, would voluntarily appear in that action to unify the litigation (R. 50).

Instead, Mrs. Marshall (the plaintiff therein) was forthwith subjected to a massive and unrelenting battle by the two oil company defendants in the District of Columbia for dismissal or removal of the case on the ground of *forum non conveniens* (R. 47), and primarily for its transfer to the Southern District of New York. Continental fought for New York and Marathon for New York or Ohio (R. 60). The motions, filed on July 30, 1964, were heavily briefed and arduously litigated, with numerous affidavits, memoranda, reply and supplemental memoranda, making a voluminous court record (R. 91). The proceedings were protracted, to the extent that a full year elapsed between the filing of the oil companies' motion and the decision of the District Court (R. 47).

On June 29, 1965 the United States District Court rendered its decision denying the transfer motions in all respects (R. 70). Then the two oil company defendants filed new motions to vacate the Order (in effect, an application for rehearing) which were again denied. Finally, under

certification, Continental and Marathon applied to the United States Court of Appeals for leave to appeal, and the application was denied (R. 48).

At last Mrs. Marshall's long struggle to hold and proceed with her lawsuit was resolved. On November 24, 1965 the defendant oil companies served their joint Answer to the Complaint—one and a half years after the Complaint had been filed and served (R. 48).

Relevant to the issue herein are certain aspects of the proceedings in the District of Columbia described in the moving affidavit below (R. 48, 49):

> "11. The strongest argument advanced by the Defendant oil companies, and the one which the Court gave the most consideration, was that New York rather than the District of Columbia would be the most convenient forum. They argued a) that Amerada's principal office is in the City of New York; b) that at least 12 of the witnesses reside in, or in the suburbs of New York City; c) that all of the relevant contracts were entered into, executed and delivered in New York City, and were performable or performed there; and d) that the construction of the relevant contracts and determination of the rights and obligations of the respective parties will be governed by the laws of New York. * * *
>
> "12. In the District Court's own opinion (Annex '2') express reference was made to 'Continental's advocacy of New York as the more appropriate forum' and the Court observed that 'a nexus between New York and this litigation is already apparent.' The Court upheld the District of Columbia as a proper forum, even without joinder there of Amerada, but plainly recognized that New York was a fitting alternative if the Plaintiff (Mrs. Marshall) had chosen it. She now must choose it for her suit against Amerada, unless this Court transfers to the District of Columbia, or Amerada submits to that jurisdiction."

With the forum battle in Washington at long last rebuffed—at great cost and travail and delay for the plaintiff Mrs. Marshall—Mrs. Marshall through her counsel addressed formal notice to Amerada (R. 71, 72) as described in the following excerpt from the moving affidavit herein (R. 50).

> "15. In the light of the final disposition of the venue question by the District Court and the Court of Appeals, and in the light of the commencement of the depositions, I deemed it proper and fitting to invite Amerada to voluntarily appear and join issue in the District of Columbia, so that all parties might be joined in a unified action in that court judicially held to be a proper forum. I therefore wrote a letter to the President of Amerada proposing such joinder on their part. Copy of my letter is annexed hereto as Annex '3'. This was my concept of how attorneys should deal with this situation, namely afford an opportunity to resolve the matter in conformance with the recent court decision and obviate dilatory maneuvers and achieve a unity in the litigation. I made it clear that if they rejected the proposal, we would have to proceed with a separate action against Amerada in a proper jurisdiction; and New York was the obvious alternative, as the situs of the principal office of Amerada, and for all the reasons of contact, nexus and convenience previously discussed."

Institution of Amerada's Declaratory Action

Instead of responding to the Notice, Amerada hastily instituted this calculated declaratory judgment action in the Court below (R. 51). The answer was not by letter, but by a jump to a Court as far removed from the situs of the pending litigation, in terms of contract and convenience, as could be imagined (R. 51).

Thereupon, Mrs. Marshall, in conformance with her prior formal notice and stated purpose to sue, instituted her direct action in the United States District Court in New York (R. 39). And in the Court below (the Court of Appellant's choice), Mrs. Marshall moved for dismissal or stay of Amerada's Texas action (R. 38) to allow her own direct plaintiff's action in New York upon the identical issues to proceed to litigation and determination; and the stay was granted.*

I.

The Declaratory Judgment Act confers a discretion upon the courts to entertain, dismiss or stay a suit thereunder, and not an absolute right upon the litigant.

It would be difficult to conjure a more compelling set of circumstances and factors warranting the discretion exercised by the District Court, and affirmed by the Fifth Circuit, than those surrounding the attempt of this petitioner to pre-empt an unsuitable forum by means of its belated declaratory suit. Despite those compelling circumstances, alluded to both by the District Court and the Court of Appeals in the opinions below, this petitioner suggests that its petition should be granted because there is some alleged conflict as between decisions of the different circuits.

---

* Following the entry of the Order of Judge Connally below, directing the stay of declaratory suit herein and directing that Mrs. Marshall's direct action in the Southern District of New York proceed with diligence and dispatch, Amerada (petitioner herein) *made a new motion in the New York action* for removal of the case to Oklahoma, which motion was denied. Respondent asks the Court to take judicial notice of the opinion of the United States District Court in the Southern District of New York, annexed hereto as Appendix "1".

None of the cases cited at page 6 of petitioner's brief as indicative of such "conflict" raises any doubt as to the propriety of the exercise of discretion herein. The cases cited concern the particular reasons why in certain patent infringement situations, the pendency of a prior suit affords a basis for restraining a subsequent suit involving the identical parties and identical issues, especially where the declaratory suit affords a more effectual means of clarifying validity and infringement issues in one place and in one suit, in lieu of a multiplicity of infringement suits in various states. Those reasons are totally foreign to the circumstances underlying the discretion exercised herein. The discretion conferred by statute and judicially recognized is acknowledged as well in the very cases cited. For example, in *Martin* v. *Graybar Electric Company*, 266 F. 2d 202 (7th Cir. 1959) (cited by Petitioner) the court wrote:

> "The core question here is whether the issuance or denial of an injunction in a case such as this is mandatory or within the discretion of the District Court and, if the latter, was there an abuse of that discretion?
>
> The Supreme Court when speaking to the problem created by the Federal Declaratory Judgments Act, 28 U.S.C.A. §§2201, 2202, and the initiation of litigation in coordinate courts by different parties has said: 'Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems.' Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 1952, 342 U.S. 180, 183, 72 S. Ct. 219, 221, 96 L.Ed. 200.
>
> We believe that this statement is applicable to and dispositive of the first portion of the question before us. To hold otherwise, laying down a judicial fiat that the prosecution of the subsequent suit must or

must not be enjoined as a matter of law, would solve few problems while at the same time creating many. We can not, nor do we attempt to, foresee the multitude of factors that would dictate the decision of the District Court in any given case.

However, it is obvious that if the decision is to be left to the discretion of the District Court rather than be the result of an unyielding rule of law, that discretion must be utilised in a wise and consistent manner. * * *" (266 F.2d, at 203)

No conflict exists as between the circuits, bearing upon the propriety of the exercise of the court's discretion below. The test defined by this Court in *Kerotest Manufacturing Company* v. *C-O-Two Fire Equipment Co.*, 1952, 342 U. S. 180, 183, 72 S. Ct. 219, 221, 96 L. Ed. 200, remains the guideline for the application of a judicial discretion in these circumstances. It plainly rejects any mechanical, fixed or rigid restraint upon the exercise of such discretion. In *Kerotest*, the Supreme Court affirmed the dismissal of the declaratory judgment proceeding. It did so despite the fact that the declaratory action, like Amerada's here, was instituted prior to the date of joinder of the declaratory plaintiff as a defendant in the direct suit. The Court upheld the Court of Appeals in its reversal of the District Court because of that Court's mistaken notion that the fact of commencement of the declaratory judgment action prior in time to the filing of the direct suit against the declaratory plaintiff (by joinder as a defendant) was determinative. The Supreme Court emphasized that the factors to be considered on retention or dismissal of a declaratory proceeding in these circumstances are "equitable in nature", call for "wise judicial administration, giving regard to conservation of judicial resources", "does not counsel rigid me-

chanical solution of such problems", and "necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts."

In affirming the dismissal of the declaratory suit, the Supreme Court accepted the conclusion of the Court of Appeals that all the foregoing considerations would be best served by prosecution of the direct action in Illinois.

In its opinion in *Kerotest,* the Supreme Court disposed in a footnote of several of the cases cited by the petitioner herein (petitioner's brief at p. 6), namely *Triangle Conduit & Cable Co., Inc.* v. *National Electric Products Corporation,* 125 F. 2d 1008 (3rd Cir. 1942), cert. den. 316 U. S. 676, and *Cresta Blanca Wine Co., Inc.* v. *Eastern Wine Corporation,* 143 F. 2d 1012 (2nd Cir. 1944). In the footnote the court made it clear that those decisions were the creatures of particular circumstances and "do not show any rigid rule", and added that in view of the basis of the Court's own decision "it would not be profitable to discuss these cases in detail."

As for the pretended "conflict" in the Circuits, it is apparent that none exists, in respect to the delineation of the scope of the court's discretion and its justified exercise at bar. Specifically, one of the Circuits mentioned at page 6 of petitioner's brief is the seventh. In *Chicago Furniture Forwarding Co.* v. *Bowles,* 161 F. 2d 411 (7th Cir. 1947), the 7th Circuit affirmed the District Court's dismissal of the plaintiff's declaratory action, and its reasons for doing so are precisely in point:

> "It is well settled that District Courts are endowed with discretion to determine whether the circumstances are such that they may well decline to entertain suits

for declaratory relief. * * * This Court in American Automobile Ins. Co. v. Freundt, 7 Cir. 103 F. 2d 613, 618 quoted with approval from Borchard on Declaratory Judgments as follows: '* * * where the defendant's action is about to begin or has begun it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponent's pending or imminent action.'

* * *

"Plaintiff insists that in other cases where the court has declined to take jurisdiction of claims for declaratory relief because of a pending case in which the same relief could be had, the latter had been filed before the declaratory judgment action. We think the respective dates of filing do not necessarily furnish the test. The question is, rather, whether the circumstances at the time of the determination are such as make the further prosecution of the suit for declaratory relief useless". (at 412, 413)

Petitioner also pretends that there is some conflict in the Third Circuit. Its assertion is plainly refuted by the clear enunciation of like principles by that Circuit as are reflected in the decision below. In *Sun Oil Company* v. *Transcontinental Gas,* 203 F. 2d 957 (3rd Cir. 1953), the Third Circuit affirmed the District Court's dismissal of a declaratory judgment action upon the opinion below, which contained the following apt reasoning:

"The Declaratory Judgments Act, 28 USCA §2201, provides that a court 'may declare the rights and other legal relations of any interested party seeking such declaration.' It does not make it mandatory on courts to accept declaratory judgment cases, but puts considerable discretion in them as to whether or not in each case a declaratory judgment should be entered. *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equip-*

ment Co., 342 U.S. 180, 72 S. Ct. 219". (108 F.Supp. 280, 282)

"Here we have a situation where a prospective defendant knowing that it is about to be sued in Texas starts a declaratory judgment proceeding in Pennsylvania against the prospective plaintiff six days before the Texas suit is filed. In my opinion it is a fair inference from this that the plaintiff in the present action has started the declaratory judgment proceeding in this court in order to have the question of its liability tried here rather than in Texas." (*Id.* at 281-2)

Nor is the Tenth Circuit in any such conflict as petitioner suggests. In *Duggins* v. *Hunt*, 323 F. 2d 746 (10th Cir. 1963), the court wrote:

"* * * The grant of jurisdiction contained in the Act is not one of compulsion and the court has the discretion whether to entertain an action for declaratory relief. *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Public Affairs Associates, Inc.* v. *Rickover*, 369 U. S. 111, 82 S. Ct. 580, 7 L. Ed. 2d 604; *Franklin Life Ins. Co.* v. *Johnson*, 10 Cir., 157 F. 2d 653. *The questions of when to exercise jurisdiction, when to hold jurisdiction in abeyance, and when to reject jurisdiction are to be determined initially by the trial court, Guardian Life Ins. Co. of America* v. *Kortz*, 10 Cir., 151 F. 2d 582, *and the judgment of the trial court will be reviewed by this court only to consider whether a clear abuse of discretion appears.*" (323 F. 2d, at 748) (emphasis added)

Nearly all the Circuits have spoken in the same consistent vein. Again, in *Shell Oil Co.* v. *Frusetta*, 290 F. 2d 689 (9th Cir. 1961), the 9th Circuit wrote:

"* * * It is well established that even though jurisdiction may exist under the Declaratory Judgment Act the

granting of declaratory judgments is at the discretion of the District Court. *Brillhart* v. *Excess Insurance Co.*, 1942, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Maryland Casualty Co.* v. *Boyle Construction Co.*, 4th Cir. 1941, 123 F. 2d 558. Said discretion is to be exercised in accordance with sound judicial principles and the purposes of the Declaratory Judgment Act. The mere fact that Shell succeeded in filing its complaint in the federal court three days before appellees filed their motions in the state court does not automatically entitle Shell to a federal declaratory judgment hearing. *Kerotest Manufacturing Co.* v. *C-O-Two* [sic] *Co.*, 1951, 342 U. S. 180, 72 S. Ct. 219, 96 L. Ed. 200. It is not the purpose of the Declaratory Judgment Act to encourage a race to the courthouse for the purpose of transferring litigation to the federal courts from the state courts." (290 F. 2d 689, 691-2)

In the 2nd Circuit, another one said to be in "conflict", the Court wrote in *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F. 2d 145 (2nd Cir. 1949), *supra*, at p. 150:

"A general rule for determining priorities as between pending actions on the basis of dates of filing has been stated in some of the cases, but it has been recognized that this rule is not to be applied in a mechanical way regardless of other considerations. *Brillhart* v. *Excess Ins. Co., supra,* 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Chicago Furniture Forwarding Co.* v. *Bowles,* 7 Cir., 161 F. 2d 411; *Western Electric Co.* v. *Hammond,* 1 Cir., 135 F. 2d 283. See *Crosley Corp.* v. *Westinghouse Elec. & Mfg. Co.,* 3 Cir., 130 F. 2d 474, 475; *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.,* 2 Cir., 143 F. 2d 1012, 1014.

In the present controversy, the question of priority is not subject to simple mechanical determination by application of this rule."

Even Mr. Borchard, cited as a significant reliance at page 9 of petitioner's brief, has given a clear expression of

the kind of discretion involved in consideration of a declaratory suit, in just such circumstances as are here pertinent. Petitioner stops short of the relevant quotations from Borchard which follow (Borchard, Declaratory Judgments, 2 Ed. 1941, p. 303):

> " . . . where a party's action is about to begin or has begun, it serves no sensible end to permit his adversary to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponent's pending or imminent action."

II.

The court below properly exercised its discretion in staying this declaratory action.

The fact situation plainly reflects the absence of any need or valid purpose for the institution of an equitable proceeding to "quiet title", or for the invocation of the special discretionary and equitable remedy of Declaratory Judgment to displace the claimant's direct action. For the true plaintiff's case (Mrs. Marshall's) is deep into litigation (two years) in the District of Columbia (R. 91, 92); her suit against Amerada, announced to Amerada in advance, is pending in New York. Amerada never before complained that it was injured by an undetermined claim against it, nor sought declaratory remedies (R. 50-51).

The claimant's suit was imminent, about to begin, anticipated—and actually noticed and announced. No worry or concern that Amerada would be ignored or left at the altar—no long empty corridor of years of uncertainty and unsettled issues facing them; an offer of unified litigation of this single case in that jurisdiction where the Federal Court and the United States Court of Appeals have

found venue, and proper forum and convenience—and a simultaneous notice of institution of separate action, upon rejection of the proposal (R. 50).

Yet they have come here and have called Mrs. Marshall's action, filed pursuant to her notice, a counter-suit. Their own calculated tactic in Texas is sought to be raised to the level of a sorely needed, worthy appeal to equity for relief from not being a defendant.

While the attacks by their colleagues in the District of Columbia raged, for a year and a half, Amerada evinced no need or interest in becoming a party, through declaratory relief. On the contrary, it was obviously a very interested and informed ally. The best they could hope for was a removal to New York. As their colleagues argued in the District of Columbia, New York was the home of Conorada; all of the contracts at issue were made there; the offices were located there; the job of Conorada management was done from there; important witnesses were there; the law of New York would govern; Amerada had its principal offices there; and the other two oil company partners did business and had important offices there.

The forum proceedings in the District of Columbia, and their ultimate result, were highly relevant to Mrs. Marshall's institution of suit against Amerada, for the decision would resolve the question of where—and so Mrs. Marshall awaited that event.

From the time of receipt of Mrs. Marshall's formal letter of claim in September 1963, and through the protracted forum proceedings in the District of Columbia, beginning in June 1964 and ending in November 1965, and even thereafter, from November 1965 to March 1966, Amerada found no need for and did not seek declaratory relief. (See *Timetable, Appendix 2, infra.*)

Amerada only acted when all uncertainty was over, and it was to be a live defendant in New York. And then it ran to the home town of Continental Oil (not its own), basing its actions on the contention that it is now a convenient place for Mrs. Marshall and itself.

The test here at issue is that of propriety, need and purpose. The court below has recognized that this declaratory proceeding is inappropriate, needless, and not in consonance with the purpose for which the remedy was conceived (R. 95-101).

In its opinion, the court below concluded that this declaratory action was triggered by the letter of March 8, 1966 written by Mrs. Marshall's counsel to the president of Amerada, inviting its appearance in the District of Columbia action, and giving notice of institution of a separate suit upon rejection of the proffer (R. 96, 99); and that Amerada made reply by filing the present declaratory action (R. 96).

The Federal courts have spoken clearly and consistently to reject this kind of resort to the Declaratory procedure and misuse of its purposes. *Shell Oil Co.* v. *Frusetta,* 290 F. 2d 689 (9th Cir. 1961); *Sun Oil Company* v. *Transcontinental Gas Pipeline Corp.,* 203 F. 2d 957 (3rd Cir. 1953); *Chicago Furniture Forwarding Co.* v. *Bowles,* 161 F. 2d 411 (7th Cir. 1947); *American Automobile Insurance Co.* v. *Freundt,* 103 F. 2d 613 (7th Cir. 1939); *Aetna Casualty and Surety Co.* v. *Quarles,* 92 F. 2d 321 (4th Cir. 1937); *Seaboard Surety Co.* v. *Texas City Refining,* 109 F. Supp. 468; *American Telephone & Telegraph Co.* v. *Henderson,* 63 F. Supp. 347; *American Insurance Co.* v. *Bradley Mining Corp.,* 57 F. Supp. 545.

In these and like decisions the Federal courts have repeatedly turned aside attempts at invoking the declaratory judgment procedure where it is used not for the purpose of bringing issues to a head which would otherwise lie long dormant and unlitigated, but as a means of gaining procedural advantage where a direct action by the claimant himself, seeking full executory relief, is pending or is imminent or is anticipated.

III.

The clear preponderance of the propriety of the New York forum, where the claimant's direct action is pending, further supports the decision below.

Not only did the Court below properly exercise its discretion to stay the Appellant's misuse of the declaratory procedure in favor of Appellee's pending and noticed direct action, but additionally rested its decision upon the clear preponderance of the propriety of the New York forum.

The Court below properly concluded, upon the facts, that:

> "The Southern District of Texas has no connection whatever with the controversy other than the fact that it is the residence of the defendant, who is willing to make herself available for deposition and discovery in New York" (R. 98-99).

As against the negligible elements of connection of the controversy with Texas, there are the following significant and cumulative elements of connection with the New York forum:

> (1) The underlying contract between the parties upon which the cause of action rests (Conorada-Curtice

contract of January 1, 1949) was executed in the City of New York (R. 98).

(2) The contract among the three oil companies,—Amerada, Continental and Marathon (then Ohio), creating Conorada and establishing the joint venture on which Conorada was engaged, was executed in the City of New York (R. 48, 63).

(3) Conorada Petroleum Corporation, which was the contracting party in behalf of Amerada, and the company for which the services thereunder were rendered, had its principal place of business in the City of New York during the times at issue in the litigation (R. 42, 48, 58).

(4) The operations of Conorada, which are the subject matter of the litigation, were conducted in and from New York during the entire period at issue (R. 18, 42, 54).

(5) All of the principal officers of Conorada had their offices in New York during the periods at issue (R. 42, 48).

(6) Amerada, the Appellant herein and the defendant in Mrs. Marshall's direct action in New York, has its principal office in New York (R. 48, 58).

(7) The law of New York governs the contract and its interpretation (R. 49).

(8) Each of the three oil companies who were parties to the underlying contract and who are joint obligors under Mrs. Marshall's claim, have principal offices and do business in the City of New York (R. 64).

(9) By the admission and contention of the defendant oil companies in the District of Columbia action, at least 12 of the witnesses in the litigation reside in or in the suburbs of New York City, and the same is reflected in the opinion of the United States District Court in the District of Columbia (R. 61). By the same contention all the relevant contracts were not only

entered into, executed and delivered in New York City, but were performable or performed there (R. 48).

In his opinion below, Judge Connally wrote:

> "Under these circumstances, I am of the view that the clear preponderance is in favour of New York as the site of trial. Mrs. Marshall is the real plaintiff and her choice of forums is not to be lightly set aside." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1946) (R. 99).

The heavy financial burden that has been imposed upon the respondent by the multiplicity of forum proceedings, including the costs of resisting the present petition, moves us to petition the Court for an allowance of reasonable damages, under Supreme Court Rule 56, for the delay and consequent expense imposed.

If respondent had been a woman of somewhat more modest means, her cause would have been long since defeated by attrition.

Respectfully submitted,

ALBERT I. EDELMAN
JAVITS TRUBIN SILLCOCKS EDELMAN
& PURCELL
275 Park Avenue
New York, New York 10022

REYNOLDS, WHITE, ALLEN & COOK
1340 Tennessee Building
Houston, Texas

Attorneys for Respondent

ALBERT I. EDELMAN
DOROTHY F. GRAY
Of Counsel

Appendix 1

M-602

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#33043

BETTYE M. MARSHALL, also known as
BETTYE M. BOHANNON,

Plaintiff,

—against—

AMERADA PETROLEUM CORPORATION,

Defendant.

MEMORANDUM

BRYAN, District Judge:

Defendant Amerada Petroleum Corporation (Amerada) moves to transfer this action to the United States District Court for the Northern District of Oklahoma for the convenience of parties and witnesses, in the interest of justice, pursuant to 28 U.S.C. § 1404(a). Plaintiff opposes transfer.

The controversy involved in this action arose out of the following factual situation:

In 1948 defendant Amerada entered into an agreement with Continental Oil Company (Continental) and Ohio Oil Company (now Marathon) to form a new corporation, the Conorada Petroleum Company (Conorada) to explore foreign petroleum properties and resources. On January 1, 1949, a service contract was entered into in New York between Conorada, Amerada, Continental and Marathon specifying the services Conorada was to provide, including

offices in New York, the establishment and maintenance of its organization and personnel, and the employment of Arthur A. Curtice as President.

A separate employment contract between Curtice, Conorada and the oil companies provided that in addition to a salary, Curtice would be entitled to "a participating interest in each and all concessions, leases and contract rights in respect of petroleum properties or resources" located in foreign areas which would be acquired by the three oil companies "as the result of negotiations initiated by Conorada during the period of Curtice's employment hereunder." This contract further provided that Curtice could grant to one or more Conorada employees any portion of his participating interest.

On January 15, 1949 Curtice employed plaintiff as his executive assistant and granted her a 10% interest in the contract. Conorada terminated the employment of Curtice on February 28, 1954, and on March 18, 1954 new officers were elected to replace him and the plaintiff. At that time Curtice entered into a letter agreement with Conorada and the three oil companies with respect to the areas in which he had earned a participating interest. Libya was not included among them. Plaintiff did not sign this agreement.

When the plaintiff's employment was terminated Libya did not permit foreign corporations to obtain oil concessions. About 1960, however, Libya reversed its position and authorized such concessions. Subsequently, Marathon, Continental and Amerada each obtained separate concessions and have been producing oil in Libya since 1963.

It is plaintiff's contention that authorization of Libyan concessions, and the concessions later obtained there by the three oil companies, resulted from the efforts of Curtice and herself during the period of their employment by

Conorada, and that she is therefore entitled to a participating interest in them.

In September 1963 plaintiff wrote to Amerada, Continental and Marathon of her intention to assert a claim to a participating interest in their Libyan oil production. When negotiations proved fruitless, in June 1964 plaintiff commenced an action against Continental and Marathon in the United States District Court for the District of Columbia where both were doing business.[1] Since Amerada was not doing business in the District of Columbia it could not be joined as a party defendant there. Both Continental and Marathon moved to transfer the District of Columbia action to this district under § 1404(a). Proceedings in the Court of Appeals for the District of Columbia eventually resulted in a denial of the motion to transfer, and in November 1965, Marathon and Continental filed answers. Plaintiff's counsel then wrote to Amerada, suggesting that it voluntarily join the District of Columbia action as a party defendant and indicating that if it did not, plaintiff would be forced to commence a separate suit against it in a district where it was amenable to service.

Instead, however, in March 1966 Amerada commenced an action against plaintiff in the United States Court for the Southern District of Texas seeking a judgment declaring that it was not liable to her.[2] On May 9, 1966 plaintiff made two countermoves: (1) she filed the instant suit

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[1] Since Marathon's principal place of business is Texas, the state of plaintiff's residence, the District of Columbia was the only federal forum in which plaintiff could sue Marathon.

[2] Amerada has stated that while it would have preferred to file its action in the Northern District of Oklahoma, it could effect service upon plaintiff only in Houston, Texas.

in this district, and (2) she moved in the Texas District Court either to transfer that action to this Court or else stay it until the completion of the New York litigation. On June 27, 1966 Judge Connally stayed further proceedings in the Texas action pending the determination of plaintiff's suit in this court.[3] On July 20, 1966 Amerada answered in the action here and made the present motion to transfer.

From this discussion it appears likely that among the issues to be litigated in the case at bar will be the meaning and legal effect of the contractual arrangements on which plaintiff relies and the nature, extent and effectiveness of the efforts made by Curtice and plaintiff toward changing the position of the Libyan Government on foreign oil concessions and in procuring the concessions eventually granted.

The legal principles governing transfer under § 1404(a) are by now so well settled and have been so frequently delineated that it is unnecessary to discuss them again here.

The principal claims made by Amerada in support of the transfer of this action to Oklahoma are (1) that litigation in that district, where its principal office and files are now located, would best serve the convenience of witnesses and parties; (2) that this suit has no logical connection with this district and plaintiff's choice of this district for the suit against Amerada was mere forum shopping; and (3) that the docket in Oklahoma is far less congested than the docket here.

Amerada lists four "potential" witnesses from Tulsa. Three of these are currently officers of Amerada and the fourth Dr. Weatherby, a retired vice president, is an

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[3] This decision is presently being appealed by Amerada to the Court of Appeals for the Fifth Circuit.

active member of its Board of Directors. Three witnesses are from Houston where plaintiff also resides. These include Thanhouser, chief counsel for Continental, who participated in drafting various of the agreements involved here, Clark, a retired Continental employee, and McCollum, Board Chairman of Continental and a Conorada Director until 1962. There are also potential witnesses associated with Marathon who reside in Findlay, Ohio.

Plaintiff, on the other hand, lists as its seven "most important" witnesses the following:

Curtice, a former president of Conorada, and Dohm, a former vice president who succeeded Curtice as president, both of whom hold shares in the participating interest under which plaintiff makes her claim. Curtice is a resident of California and Dohm is now retired and lives in New York. Jacobson, Chairman of the Board and founder of Amerada, is a resident of New York and has an office here. Cram, a former Conorada director and executive of Continental is retired and lives in New York. Donnell, president of Marathon, is evidently a resident of Ohio but his deposition in the District of Columbia suit was taken at his New York office. While McCollum, the Continental Board chairman, is a resident of Houston, his deposition in the District of Columbia action was also taken in New York at the offices of his company there. While plaintiff herself is a resident of Houston, she is a frequent visitor to New York. In addition to these seven witnesses plaintiff indicates that she may call officials of the United States Government from Washington and foreign witnesses from Libya and elsewhere.

When the convenience of witnesses is balanced it is plain that the scales are not even slightly tipped in favor of

transfer to Tulsa. At least three witnesses not now associated with any of the parties presently reside in New York. McCollum from Houston and Donnell from Ohio have already had depositions in the Washington action taken at their New York offices. Of the two other Houston witnesses, Thanhouser, as counsel for Continental, must necessarily be involved in the related Washington litigation. No good reason has been shown why Clark, the only other Houston witness, cannot be brought to New York by Amerada if his testimony is necessary.

As far as witnesses from California or Ohio are concerned, plainly it is at least as convenient, if not more so, for them to come to New York rather than Tulsa. It can scarcely be gainsaid that New York would be more convenient for foreign witnesses and Government witnesses from Washington than Tulsa.

The four Tulsa witnesses are all employees of or associated with Amerada and their convenience can be given little weight on this application. Moreover, Amerada has offices in New York and it would be surprising if its Tulsa officers were not frequently there or that to come here would be much of an inconvenience.

I am wholly unpersuaded that the convenience of witnesses in the sense that that term is used on applications of this nature would be served by a transfer to Tulsa.

Defendant lays stress on what it claims to be the great inconvenience and burden which would be placed upon it by having to litigate in New York. These claims are not persuasive and carry little weight. While its principal offices, legal department and main files are in Tulsa, and Conorada's operations and records were moved there in 1962 and integrated with Amerada's, Amerada has offices

in New York. I cannot imagine that the material needed from its Tulsa files will be so voluminous as to make it unduly difficult for whatever is required to be taken to New York. Indeed, plaintiff says that Amerada has already produced all relevant material in New York pursuant to subpoena issued in the District of Columbia action.

Even though Amerada made the choice not to appear as a party in the Washington action, doubtless its counsel will have to attend the trial and witnesses from Amerada will be required. The fact that the additional New York action was required is largely its own doing and evokes little sympathy.

When balanced against the plaintiff's choice of forum, which should not be lightly disturbed, the foregoing considerations do not militate in favor of transfer.

This is particularly so where, as here, plaintiff's choice of forum rests on an entirely rational basis. The agreement upon which she relies was made in New York. The offices of Conorada where she worked with Curtice were here. It appears likely that questions of New York law will to a substantial degree govern. Plaintiff herself, though a resident of Houston, is frequently in New York and no stranger there.

It was no fault of plaintiff's that she did not sue Amerada in the District of Columbia which was the only place where she could get federal jurisdiction over Marathon and Continental both. She was unable to get jurisdiction over Amerada there and Amerada refused to appear though given the opportunity to do so. The Oil Company defendants in that action were evidently of the view that New York was a proper and convenient forum. The Texas District Court was of the same view.

The charges of forum shopping levelled against plaintiff are wholly without foundation.

Finally, the fact that the docket of this court is considerably more congested than that in the Northern District of Oklahoma, entitled to only slight weight in any event, could not conceivably overcome the factors against transfer which I have just mentioned.

Amerada has wholly failed to sustain its burden of showing that the transfer which it seeks is required for "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

The motion to transfer is in all respects denied.

It is so ordered.

Dated: New York, N.Y.
December 14, 1966

FREDERICK VP. BRYAN
United States District Judge

Appendix 2

TIMETABLE (R. 47-51, 87-92)

1961-Early 1962	Commercial production and marketing of Libyan Oil giving rise to cause of action.	
1962-Early 1963	Attorneys retained by Mrs. Marshall investigate facts and law.	
Sept. 17, 1963	Attorneys for Mrs. Marshall (Batzell & Meyers) transmit formal claim letter to Continental, Marathon and Amerada.	Amerada finds no need and makes no claim for declaratory relief.
End of Sept. and Oct. 1963	Replies by the three oil companies requesting joint meeting.	Ditto
Oct. 25, 1963	Meeting between Mrs. Marshall's counsel and counsel on behalf of three oil companies.	Ditto
Nov. 1963-Jan. 1964	Further correspondence between Marshall's counsel and three oil companies.	Ditto
Jan. 29, 1964	Meeting between counsel for the three oil companies and Marshall's attorneys.	Ditto
Feb.-May 1964	Correspondence between counsel attempting to work out settlement formula.	Ditto
June 12, 1964	Marshall's counsel writes to three oil companies to reject settlement.	Ditto

June 25, 1964	Mrs. Marshall files suit in District of Columbia against Continental and Marathon.	Ditto
July 30, 1964	Continental and Marathon move for transfer of suit (notably to New York on ground of *forum non conveniens*).	Ditto
July 30, 1964-June 1965	Extensive proceedings on motion to transfer.	Ditto
June 29, 1965	U. S. District Court, District of Columbia, retains jurisdiction and denies Continental and Marathon motions.	Ditto
July 7, 1965	Continental and Marathon move to vacate order.	Ditto
Aug. 26, 1965	U. S. District Court denies motion but grants application for certificate to allow appeal. Appeal denied and finally:	Ditto
Nov. 4, 1965	U. S. Court of Appeals denies Leave to Appeal.	Ditto
Nov. 24, 1965	Continental and Marathon answer complaint in District of Columbia.	Ditto
Dec.-Feb. 1965-66	Trial counsel retained by Mrs. Marshall who reviews file and records.	Ditto
Feb. 2, 1966	Depositions of Conorada's officers noticed to commence and continue in New York.	Ditto

Mar. 25, 1966	*Letter of Mrs. Marshall's counsel* (Annexed to moving affidavit) *proposing entry of Amerada into District of Columbia action, failing which separate suit will be instituted.*	
Apr. 5, 1966	Amerada's reply to Mrs. Marshall's counsel advising of filing of declaratory judgment action in Texas.	Amerada first claims need for declaratory relief, in Texas proceeding.

SUPREME COURT

FILED
DEC 11 1967
JOHN F. DAVIS, CLERK

No. 770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petitioner's Reply to Respondent's Memorandum in Opposition to Petition For Writ of Certiorari

JOSEPH W. MORRIS
GEORGE E. ERICKSON, JR.
P. O. Box 2040
Tulsa, Oklahoma
CECIL E. MUNN
1800 First National Building
Fort Worth, Texas
Counsel for Petitioner

December 8, 1967

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

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Respondent's opposition brief strays far beyond the Record, indulging in repeated self-serving declarations having nothing whatever to do with the issue of whether this Court, in the exercise of its responsibility for supervising the Federal Judiciary, ought to issue the writ of certiorari prayed for in order to maintain the viability of the Federal Declaratory Judgment Act. Reluctantly, petitioner is compelled to comment on respondent's more grievous departures.

MRS. MARSHALL'S IRRELEVANT DEPARTURES FROM THE RECORD

Mrs. Marshall claims something her assignor and co-assignee have both agreed no one is entitled to. (R. 78). Three companies made a contract with her assignor and she asserts that their obligations thereunder were joint, (Opp. Br. 2), citing the Record

herein (R. 6). But the Record (R. 6) shows the contract cited was between the companies *only* and the "joint" undertaking referred to had nothing to do with obligations to Mrs. Marshall's assignor. Company obligations to her assignor were in fact *several* as the *applicable* contract clearly shows (R. 25). Similarly, the implication that Amerada is somehow involved in Mrs. Marshall's lawsuit against the other companies (Opp. Br. 4) is without foundation. The assertion that Mrs. Marshall "believed" Amerada would "voluntarily appear" in her lawsuit against other companies (Opp. Br. 4) reflects wishful thinking rather than belief founded on fact. Amerada has never been a party to Mrs. Marshall's other lawsuit and has given her no reason whatever to "believe" it would relinquish its independent defense and voluntarily submit itself to the jurisdiction of a forum with which it has no connection, and which was obviously selected solely for the convenience of Mrs. Marshall's Washington, D.C. counsel.

With inappropriate resort to vitriolics, the opposition brief complains of "attacks" against Mrs. Marshall which have "raged" in the District of Columbia for "a year and a half" (Opp. Br. 15) by parties not even involved in this lawsuit. Amerada's independent exercise of a right given by law in filing its declaratory action after two years of unfulfilled threats is described as a "calculated tactic" (Opp. Br. 15). The inference is made that the District Court below found Amerada guilty of a "misuse of the declaratory procedure" (Opp. Br. 17). Yet that inference is incon-

ceivable from reading the District Court's opinion (R. 25).

Intemperate suggestions of corporate abuse of judicial process are equally unfounded. Not a scintilla of evidence exists within (or without) the Record to indicate otherwise. It must be recalled that it is *Mrs. Marshall* who determined to split the claim, which she now insists is joint, by suing two companies and just perpetuating her *threats* against the third. Had she really been concerned with ordinary, prompt prosecution of those claims, that action could have been instituted against all three companies in her resident city of Houston, Texas. If she had unified her claims in a logical forum, a decision on the merits would in all probability have been reached. For reasons of her own, however, she sought a hearing far from home where she has no interests whatever, well knowing that in doing so only *two* companies could be joined (R. 96). With that determination, *she* split her claims and is alone responsible for having two lawsuits instead of one.

After being deliberately excluded from litigation threatened in 1964, Amerada waited until 1966 for some action to be taken. Hearing nothing, it resolved to establish its nonliability (R. 81) and filed its declaratory action in the only forum available to it . . . Mrs. Marshall's resident city of Houston, Texas. The opposition brief pretends this is an impertinence, characterizing the exercise of a legal *right* in the only possible forum as a "jump to a court as far removed from the pending ligitation, in terms of contract and

convenience, as could be imagined" (Opp. Br. 6). Of course, there was *no* "pending litigation" against Amerada, which is precisely why the declaratory action was brought; and the extraordinary language of the opposition brief really amounts to an assertion that Amerada had no right to do *anything* but await the pleasure of respondent. Indeed Mrs. Marshall faults Amerada because when it did move to settle the dispute Amerada had "never before complained that it was injured by an undetermined claim against it, nor sought declaratory remedies" (Opp. Br. 14). What does this confused, irrelevant language mean; and what place has it in this Court?

Perhaps the most perplexing irrelevancy posed by respondent is the inflammatory charge that Amerada "ran to the home town of Continental Oil (not its own)" (Opp. Br. 16) to file its declaratory action . . . when in fact Amerada did nothing but attempt to put Mrs. Marshall to a proof in the *only* forum open to it, which happened to be *her* "home town".

Finally, Mrs. Marshall is a knowledgeable litigant. The wife of a highly successful attorney-oil man (R. 79) and a former business woman of many years experience in the oil industry, she has characterized herself as a former "key executive" (Opp. Br. 2). For her to demand damages under Rule 56 of this Court as the result of "the multiplicity of forum proceedings" (Opp. Br. 19) which exist only because of the split claim *she* conceived, is no less than incredible. Her complaint of a "massive and unrelenting battle" (Opp. Br. 4) by adversaries having nothing

to do with this lawsuit bears no relation to the reality of the circumstances she fashioned. What Mrs. Marshall pretends to want is for Amerada to pay her expenses in an action in which Amerada is not a party because she is dissatisfied with *her* decision to generate multiplicious harassing litigation. Surely, no one will ever be afforded such preferential treatment by a Federal Court.

THE VIABILITY OF THE DECLARATORY JUDGMENT ACT IS THE REAL ISSUE

Federal declaratory procedure is a creature of reform legislation intended to pierce the rigidity of the old forms of action and provide a vehicle for moving promptly to the substance of a controversy. The contract interpretation dispute involved here is typical of precisely the kind of disagreement for which declaratory relief was intended.

Mrs. Marshall regards the declaratory judgment as a "special" remedy, inferior to her accounting action which she categorizes as a "direct" action (Opp. Br. 14). She advises that her accounting action was found to be "more appropriate" by the District Court (Opp. Br. 2), although in fact her action was considered *equally* capable of deciding the controversy as Amerada's declaratory action (R. 98). Where, as here, a federal declaratory judgment action is prior to an *equally* satisfactory "direct" action between *exactly* the same parties, posing *exactly* the same issues, Amerada maintains that the declaratory action *must* be heard because the judicial discretion not to enter-

tain a declaratory action arises only where parties or issues are different or the Court finds a declaratory action less capable of determining the dispute. Reasonable reflection shows this *must* be the rule, or else the Federal Declaratory Judgment Act is meaningless wherever forum shopping defendants elect to file a later "direct" action, no matter how well founded the prior declaratory action may be. Using such self-serving descriptions as "formal notice and stated purpose to sue" (Opp. Br. 7) Mrs. Marshall advises that her letter of March 8, 1966, prevented Amerada from taking the action it had already embarked upon (R. 81). Her previous letters had threatened legal action, with none forthcoming; but somehow special significance is to be attached to *this* one. The District Court frankly agreed (R. 99) and Amerada respectfully suggests that agreement was erroneous. Probably thousands of such letters are written by lawyers every day. Few mean all that they say, and none have the significance attached by Mrs. Marshall. It is legal action itself, not the threat thereof, which carries the day.

> "A contest begins when the contestants, satisfied no longer with minatory gestures, are at grips with each other in the arena of fight. When the fight is a civil controversy, the arena is the court."[1]

Mrs. Marshall is confident the Federal Declaratory Judgment Act is being uniformly administered without conflict among the Circuits (Opp. Br. 9). The

[1]Cardozo: *Killian v. Metropolitan Life Insurance Company*, 251 N.Y. 44, 166 N.E. 798 (1929).

petition herein makes it clear that such is not the case. One example proves the point.

Fifth Circuit Opinion herein, page 663

"The District Court clearly was vested with discretion in deciding whether to hear the declaratory judgment suit which involves the *same parties and issues* as Mrs. Marshall's action filed in a court of coordinate jurisdiction." (Emphasis supplied).

[Significantly, the above Fifth Circuit view is immediately followed by citations of *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), and *Brillhart v. Excess Insurance Company*, 316 U.S. 491 (1942), *neither of which are in point* as shown in the petition herein page 10].

Seventh Circuit Opinion, *Martin v. Graybar Electric Company*, 266 F.2d 202 (7th Cir. 1959)

"Thus two facts were self-evident and undisputed when Martin filed his motion for injunction: a) there were two actions between the *same parties* involving *identical issues* pending at the same time in two United States District Courts, and b) this action was filed *first* and was pending when Graybar filed its suit in Iowa." (Emphasis supplied).

* * *

"As [no unusual circumstance] appears in this record, we believe with what would seem to be the established general rule that the party filing later in time should be *enjoined* from further prosecution of his suit." (Emphasis supplied).

* * *

"The reasons for the general rule are 'just as valid when applied to a situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits.'"

Mrs. Marshall advises this Court the Seventh Circuit does not conflict with the Fifth as shown in *Graybar* above. Citing the earlier case of *Chicago Furniture Forwarding Company v. Bowles*, 161 F.2d 411 (7th Cir. 1947), she correctly extracts language

restating the fact that discretion exists to hear declaratory actions. With that bland statement we agree. However, after advising this Court that *Bowles* is "precisely in point" (Opp. Br. 10) she neglects to show that *Bowles* involved two consolidated actions *in the same court* . . . the declaratory elements of which were dismissed because *moot!*

The court below held that, notwithstanding the identity of issues and parties, there was **no duty to proceed to adjudicate the issues** in the earlier declaratory suit because the jurisdiction of the district court under the Declaratory Judgment Act is discretionary. In direct conflict is the following holding of the Third Circuit in *Crosley Corporation v. Westinghouse Electric and Manufacturing Company*, 130 F.2d 474, 475 (3rd Cir. 1942), cert.den. 317 U.S. 681 (1942):

> "Since the court below took jurisdiction of the declaratory suit before the infringement suits were filed in the district court in Ohio, even though but one day intervened, it **became its duty to proceed to adjudicate the issues** between the parties and meanwhile to enjoin them from proceeding further in the Ohio suits. We do not *overlook* the fact that the jurisdiction of the district court under the Declaratory Judgment Act, 28 U.S.C.A. § 400, is *discretionary*. Brillhart v. Excess Ins. Co. of America, 1942, 62 S.Ct. 1173, 86 L.Ed. ..... However, this is a legal discretion which must not be exercised arbitrarily but rather in accordance with fixed principles of law."

The opposition brief (pp. 9-10) would leave the impression that this Court's opinion in *Kerotest Manufacturing Company v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952) somehow obviates this striking conflict among the Circuits on the right to be heard under the Federal Declaratory Judgment Act. The opposition brief argues (p. 9):

> "In *Kerotest*, the Supreme Court affirmed the dismissal of the declaratory judgment proceeding. It did so despite the fact that the declaratory action, like Amerada's here, was instituted prior to the date of joinder of the declaratory plaintiff as a defendant in the direct suit."

The statement is literally true but misleading unless read with great care. The fact is that, unlike our case, the claimant's action for patent infringement was filed in Illinois on January 17, 1950, three months *prior* to the filing of the declaratory judgment action in Delaware on March 9, 1950. It is true that the plaintiff in the declaratory judgment action was not made a defendant in the first case until after the declaratory judgment action had been filed. But the holding of the Court was that, since that party was at all times subject to the jurisdiction of the first court and since only the first court had jurisdiction over all of the parties involved in the litigation, it was proper for the first action to take precedence over the *subsequently* filed declaratory judgment suit. In contrast the case at bar presents the situation of a declaratory judgment action which was filed first and which is sought to be defeated by

a subsequent countersuit involving identical issues and identical—not additional—parties. In fact *Kerotest* expressly negatives Mrs. Marshall's main theme that, as the claimant, she has a paramount right to choose the forum. This Court said:

> "The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgment Act to give him a *paramount* right to choose the forum for trying out questions of infringement and validity. *He is given an equal start in the race to the courthouse, not a headstart.*"

Finally the opposition brief would attempt to justify the refusal to hear the declaratory suit on the ground of *forum non conveniens*. Curiously Mrs. Marshall seeks comfort in an argument made, not by Amerada but by Continental and Marathon, in her District of Columbia litigation against them. She reasons (Opp. Br. 4):

> " * * * the two oil company defendants in the District of Columbia for dismissal or removal of the case on the ground of *forum non conveniens* (R. 47), and primarily for its transfer to the Southern District of New York."

Of far more pertinence are Mrs. Marshall's *own* concessions in *her* brief in that District of Columbia suit:

> "Plaintiff's claim and its attendant transactions and circumstances have *no* neat, parochial locus." (p. 38).

> " * * * in the circumstances of this case, there is no locale which is, factually or legally, persuasive of the forum to be selected, * * * ." (p. 14).
>
> "*Geographically New York is farther from plaintiff*, Continental and Marathon than is the District of Columbia. It is no more accessible by plane, train or motor vehicle. The bulk of the witnesses and records would be beyond the reach of the process of the court." (p. 16).

But the conclusive answer to this argument is that the doctrine of *forum non conveniens* can, as a matter of law, have no application here because the only forum available for the declaratory judgment action was the one where it was filed. This Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) settled the earlier conflict and authoritatively established the proposition that the *forum non conveniens* transfer statute is applicable only if the action could originally have been brought in a different jurisdiction. It is equally settled law that the common law doctrine of *forum non conveniens* has application only where the party filing the suit had a *choice* of forum. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 506 (1946).

The Federal Declaratory Judgment Act is an important statute. On the calendar of judicial time it is still relatively new. Its uniform application is extremely important to effective judicial administration. The conflict among the Circuits upon the right to be heard, in a situation where the declaratory defendant files a countersuit involving the *same issues*

and the *same parties* but in a *different* forum, ought to be resolved by an authoritative decision of this Court.

Respectfully submitted,

JOSEPH W. MORRIS
GEORGE E. ERICKSON, JR.
CECIL E. MUNN

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